

Update: Sexual Assault Benchbook

CHAPTER 3

Other Related Offenses

3.9 Crime Against Nature (Sodomy/Bestiality)

A. Statutory Authority

1. Sodomy

Insert the following language at the top of page 142 immediately before the section addressing bestiality:

It is unlikely Michigan's sodomy law would withstand a substantive due process challenge to its constitutionality following the United States Supreme Court's decision in *Lawrence v Texas*, 539 US ____ (2003). The Court struck down a Texas statute prohibiting "deviate sexual conduct" between members of the same sex. 539 US at _____. In doing so, the Court reviewed and rejected its decision in *Bowers v Hardwick*, 478 US 186 (1986), in which the majority upheld the constitutionality of a Georgia statute similar to Michigan's statute. 539 US at _____.

At the time *Bowers* was decided, Georgia law, like Michigan's current statute, prohibited sodomy between same-sex *and* different-sex couples. The Texas law at issue in *Lawrence*, however, prohibited only members of the same sex from engaging in "deviate sexual conduct." The Court in *Lawrence* prefaced its decision to overrule *Bowers* by stating that the laws at issue in both cases do more than prohibit a particular sexual act:

"The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes seek to control a personal relationship that, whether or not entitled

to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

* * *

“When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.” 539 US at ____.

After conducting a comprehensive examination of relevant case law and treatises, the Court observed that a decision in *Lawrence* based on Equal Protection could be relatively ineffective. The Court reasoned that its decision in *Bowers* left open the possibility that Texas lawmakers would simply rephrase the prohibition against “deviate sexual conduct” to include such conduct between different-sex participants. The Court preempted this result by overruling *Bowers*:

“If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.” 539 US at ____.

CHAPTER 7

General Evidence

7.3 Evidence of Other Crimes, Wrongs, or Acts

Insert the following case summary at the top of page 341 before the bulleted paragraph discussing *People v Layher*:

The trial court did not abuse its discretion by admitting evidence against the defendant of his consensual relationships with two young women other than the complainants, as well as evidence of the defendant's indecent exposure convictions returned by the jury at the defendant's first trial. *People v Ackerman*, ___ Mich App ___, ___ (2003).

In *Ackerman*, the defendant was the mayor of Port Huron and served as a supervisor at a community youth center during the time of his misconduct. Several young females testified that the defendant allowed his pants to fall down to expose his genitals to the girls when they were at the youth center. The trial court permitted the evidence because it was relevant to the defendant's plan, scheme, and system of introducing young females to his sexual misconduct, and the court determined that the evidence's probative value was not substantially outweighed by the danger of unfair prejudice. The Court of Appeals affirmed the trial court's admission of this other-acts evidence and agreed it was offered for the proper purpose of "show[ing] defendant's system of selecting, desensitizing and seducing victims." *Ackerman, supra* at ___.

CHAPTER 8

Scientific Evidence

8.2 Expert Testimony in Sexual Assault Cases

C. Expert Testimony on “Rape Trauma” and the Emotional and Psychological Makeup of Victims and Defendants

2. Expert Testimony Regarding Defendant Behaviors

Insert the following text at the top of page 411:

Where the evidence showed that the defendant routinely engaged in improper conduct in the presence of young females, the trial court properly admitted expert testimony regarding patterns of behavior used by adult sex offenders to desensitize their child victims. *People v Ackerman*, ___ Mich App ___, ___ (2003). In *Ackerman*, the expert witness was a psychotherapist with a master’s degree in clinical social work who specialized in sexual abuse and trauma. Significantly, the majority of the expert’s work focused on offenders rather than victims.

The expert witness testified about the “molestation scenario” employed by adult offenders to desensitize child victims to inappropriate sexual conduct. The “molestation scenario” develops and unfolds over time during which the victim becomes familiar with the offender and the offender becomes confident that the victim will not disclose the abuse. According to the witness, the scenarios often begin with rather innocuous acts aimed at giving the child victim the sense that the victim’s interactions with the offender represent acceptable behavior. *Ackerman, supra* at ___.

The defendant argued that expert testimony about *offenders’* conduct was not permitted under *People v Peterson*, 450 Mich 349, modified 450 Mich 1212 (1995). The defendant claimed that *Peterson* only permitted an expert to testify about behaviors typically exhibited by *victims* of child sexual abuse, and that this limited expert testimony was necessary because some victim behavior appears inconsistent with having been abused. *Ackerman, supra* at ___.

The Court of Appeals affirmed the trial court’s ruling allowing the expert testimony, noting that the defendant’s reliance on *Peterson* was misplaced:

“The *Peterson* Court simply did not address admissibility of expert testimony concerning typical patterns of behaviors by adults who perpetrate child sexual abuse.”
Ackerman, supra at ___.

CHAPTER 9

Post-Conviction and Sentencing Matters

9.4 The Sentencing Hearing

B. Defendant's Right of Allocution

Insert the following paragraph on page 450 before the paragraph beginning with “A court may, in its discretion . . .”:

The Michigan Supreme Court recognized the historic underpinnings of allocution and reaffirmed the fundamental importance of affording a defendant the opportunity to allocute before he or she is sentenced in *People v Petty*, 469 Mich ___, ___ (2003). *Petty* involved a juvenile convicted and sentenced as an adult in designated case proceedings. The trial court did not allow the juvenile defendant an opportunity to speak before imposing sentence. The Michigan Supreme Court reaffirmed its statement in *People v Petit*, 466 Mich 624, 629 n 3 (2002), that although MCR 6.425(D)(2)(c) does not require a court to specifically ask a defendant whether he or she wishes to speak, the better practice is to do so.

CHAPTER 9

Post-Conviction and Sentencing Matters

9.6 Post-Conviction Request for DNA Testing

Insert the following case summary after the first paragraph on page 472:

The Michigan Supreme Court granted the prosecutor's leave to appeal from the Court of Appeals' decision granting the defendant a new trial based on newly discovered evidence—a third party's confession to the crime for which the defendant was convicted. *People v Cress*, 467 Mich 889 (2002). The Michigan Supreme Court agreed with the trial court: the third party was not credible and his confession was likely false. *People v Cress*, ___ Mich ___, ___ (2003).

Citing to a pair of 1928 cases, the Court noted that “[a] false confession (i.e., one that does not coincide with established facts) will not warrant a new trial, and it is within the trial court's discretion to determine the credibility of the confessor.” *Cress*, *supra* at ___, citing *People v Simon*, 243 Mich 489, 494 (1928); *People v Czarnecki*, 241 Mich 696, 699 (1928). Because the Court of Appeals erred in substituting its judgment for that of the trial judge with regard to the confessor's credibility, the Supreme Court reinstated the trial court's denial of the defendant's motion for a new trial.

Add the following language to the cross-reference (indicated with *) at the top of page 472:

On remand, the circuit court found no evidence that the prosecutor's office acted in bad faith in destroying the evidence. *People v Cress*, ___ Mich ___, ___ n 4 (2003).